

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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In the Matter of )

Comment Sought on Petition for )  
Reconsideration of Auction 902 Procedures )  
Public Notice )

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) AU Docket No. 13-53  
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**JOINT OPPOSITION OF COMMNET WIRELESS, LLC, THE NAVAJO TRIBAL  
UTILITY AUTHORITY AND NTUA WIRELESS, LLC TO PETITION FOR  
RECONSIDERATION**

Commnet Wireless, LLC,<sup>1</sup> the Navajo Tribal Utility Authority (“NTUA”)<sup>2</sup> and NTUA Wireless, LLC (“NTUA Wireless”),<sup>3</sup> on behalf of themselves and their subsidiaries and affiliates (collectively, the “Parties”), by their attorneys, respectfully submit this joint opposition in response to the *Petition for Reconsideration* of the Wireless Telecommunications Bureau’s and the Wireline Competition Bureau’s (collectively, the “Bureaus”) Auction 902 Procedures filed by Smith Bagley, Inc. (“SBI”) (the “*Petition*”).<sup>4</sup>

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<sup>1</sup> Commnet is a wholly owned subsidiary of Atlantic Tele-Network, Inc. (“ATN”), a publicly-traded corporation specializing in providing wireless telecommunications services to rural areas.

<sup>2</sup> NTUA is a not-for-profit enterprise of the Navajo Nation and provides utility services (water, wastewater, gas, electricity, and telecommunications) to the Navajo Nation.

<sup>3</sup> NTUA Wireless is a telecommunications service provider specifically formed for the purpose of bringing advanced wireless telecommunications services to the residents of Tribal lands of the Navajo Nation, a Federally-recognized American Indian Tribe. NTUA is the majority owner of NTUA Wireless and jointly manages NTUA Wireless along with Commnet, the minority owner of NTUA Wireless.

<sup>4</sup> Smith Bagley, Inc., Petition for Reconsideration, AU Docket No. 13-53 (filed Sept. 6, 2013) (“*Petition*”); *See also* Comment Sought on Petition for Reconsideration of Auction 902 Procedures, Public Notice, DA 13-1876, AU Docket No. 13-53 (Sept. 9, 2013) (“*Public Notice*”).



The Bureaus correctly excluded the census blocks that SBI is again seeking to have added to Auction 902. SBI's *Petition* does not warrant the Bureaus' consideration because it relies upon information that should have been introduced during the notice and comment period. Consequently, pursuant to 47 U.S.C. §1.106(p), the Bureaus should dismiss or deny SBI's *Petition*. In the event that the Bureaus decide to consider SBI's recent submission of information, the Parties argue in the alternative that the Bureaus should find that SBI's *Petition* nevertheless lacks substantive merit and should be denied.

**I. SBI'S *PETITION* DOES NOT WARRANT CONSIDERATION BY THE BUREAUS AND SHOULD BE DISMISSED OR DENIED**

SBI claims that in its initial comments it “described, with specificity, how [its] drive tests were conducted” through two declarations.<sup>5</sup> The Bureaus, however, disagreed with SBI's proffered evidence and found that SBI did “not sufficiently explain the methodology or the baseline used to conduct its drive tests.”<sup>6</sup> With this *Petition*, SBI seeks to have the Bureaus revise their prior decision, in violation of the Commission's rules and precedent.

It is well established that a party filing a petition for reconsideration in a non-rulemaking proceeding may not introduce or rely upon new facts or arguments unless they meet a very narrow exception.<sup>7</sup> Either the new facts or argument must be related to events or changed circumstances that have occurred since the last opportunity to present these facts, or the new facts or arguments were unknown to the petitioner until after his last opportunity to present

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<sup>5</sup> *Petition*, 2.

<sup>6</sup> Tribal Mobility Fund Phase I Auction Rescheduled for December 19, 2013 Notice and Filing Requirements and Other Procedures for Auction 902, DA 13-1672, AU Docket No. 13-53, ¶ 26 (rel. Aug. 7, 2012) (“*Auction 902 Procedures Public Notice*”).

<sup>7</sup> See 47 C.F.R. §1.106(c).



them.<sup>8</sup> However, if the petitioner relies on facts or arguments that do not fit these exceptions, then the petition “plainly do[es] not warrant consideration” and may be “dismissed or denied.”<sup>9</sup>

SBI’s petition is an additional attempt to convince the Bureaus that SBI’s proposed census blocks are unserved, and thus, eligible for inclusion in the Tribal Mobility Fund Auction 902, despite the Bureaus concluding that Commnet and others already provide service in certain blocks at issue.<sup>10</sup> SBI hopes to achieve this by offering purported new facts and arguments in the form of a new declaration from Mr. Horacio Nevarez, an engineer who helped prepare SBI’s originally rejected evidence.<sup>11</sup>

SBI has not demonstrated that Mr. Nevarez’s declaration fits into any of the exceptions to the prohibition against reasserting facts or arguments in petitions for reconsideration that were previously rejected. First, the purported “new” facts presented by Mr. Nevarez are not related to events or changed circumstances that have occurred since SBI’s last opportunity to present them to the Bureaus, nor were these facts unknown to SBI during the comment period. Mr. Nevarez’s declaration describes SBI’s drive tests that were conducted well before the initial SBI comments filed in this proceeding. SBI does not claim to have conducted further tests or to have gained new information since its presentation in initial comments filed in May, and instead, SBI relies upon these same drive tests that it conducted previously and described in its initial comments. SBI now chooses to submit further details – details well known before the conclusion of the

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<sup>8</sup> 47 C.F.R. §1.106(c)(1); 47 C.F.R § 1.106(b)(2). The Commission or Bureaus may also determine that the “new” facts or arguments relied upon are necessary for the public interest and the *Petition* may be granted. *See* 47 C.F.R. § 1.106(c)(2).

<sup>9</sup> 47 C.F.R. § 1.106(p).

<sup>10</sup> *See Auction 902 Procedures Public Notice*, ¶ 26.

<sup>11</sup> Mr. Nevarez performed drive tests that were conducted on April 29, 2013 and relied upon for SBI’s original comments as filed on May 10, 2013. Mr. Nevarez’s declaration, which is attached to SBI’s *Petition*, describes these April 2013 drive tests. *Petition*, 4, Attachment A: Statement of Horacio Nevarez.



notice and comment period – in this *Petition*, and makes no attempt to explain why this information could not have been submitted previously.

Second, the Bureaus should not permit these new facts to be introduced into the record on public interest grounds. SBI contends that there were no rules or requirements cited by the Bureaus that would lead it to believe that it had to provide detailed information that would explain the methodology or the baseline used to conduct its drive tests – or even to identify the census blocks in which it conducted the tests.<sup>12</sup> This is false. SBI actually cites to the Bureaus’ specific recommendation that “the Bureaus found demonstrations of coverage to be more credible and convincing where they were supported by maps, discussion of drive tests, explanation of methodologies for determining coverage, and certifications by one or more individuals to the veracity of the materials provided.”<sup>13</sup> The Bureaus asked for specific information, and SBI ignored responding to such requests in a timely manner. SBI must not now be allowed to do what it was plainly directed to do in the first instance. Moreover, what SBI does in its *Petition* is propose standards that are not contemplated by the Bureau’s *Auction 902 Comments Public Notice* or regulations. SBI had the opportunity to present this “evidence” in direct response to the Bureaus’ above statement, but chose not to do so. Thus, SBI should not be allowed to introduce these additional facts at this stage, and waste the Bureaus’ time and resources on “another bite at the apple.”<sup>14</sup> SBI had the information contained in Mr. Nevarez’s

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<sup>12</sup> *Auction 902 Procedures Public Notice*, ¶ 26.

<sup>13</sup> *Petition*, 1-2 (emphasis added); citing Tribal Mobility Fund Phase I Auction Scheduled for October 24, 2013 Comment Sought on Competitive Bidding Procedures for Auction 902 and Certain Program Requirements, DA 13-323, AU Docket No. 13-53, ¶ 21 (rel. March 29, 2013) (“*Auction 902 Comments Public Notice*”).

<sup>14</sup> In another rejection of a petition for reconsideration, the Commission recognized that parties “cannot ‘sit back and hope that a decision will be in its favor and then, when it isn’t, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such procedure were allowed.’” *In re Applications of Ogden*



declaration at the time it submitted its initial comments and *chose* not to take the extra step and provide such additional details. Other parties, such as Commnet, did take the extra time and effort to follow the Bureaus' recommendation, and the Bureaus made their correct determination accordingly.

## **II. IN THE ALTERNATIVE, THE BUREAUS SHOULD DENY SBI'S *PETITION* ON THE MERITS BECAUSE THE ARGUMENTS PRESENTED ARE FLAWED**

The Bureaus concluded "that the drive test data submitted by SBI is not sufficiently verifiable to justify the addition of the census blocks requests."<sup>15</sup> On the other hand, the Bureaus found that Commnet provided "credible and convincing evidence supported by maps, certifications, and explanations of methodologies for determining coverage, [and] that many of the census blocks identified by SBI as unserved are actually served."<sup>16</sup> Nothing in SBI's *Petition* compels a reversal of the Bureaus' determination.

Despite the Bureaus' clear determination, SBI's *Petition* claims that "the maps provided by AT&T and CommNet – no matter how they are explained – cannot be more credible than SBI's actual drive tests."<sup>17</sup> In fact, SBI goes so far as to describe Commnet's maps as "unsubstantiated."<sup>18</sup> While SBI makes these assertions, it fails to support them with any clear substantiated support or information. As the Bureaus found, Commnet specifically supported its assertions in its reply comments and provided declarations describing the methodology and

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*Television, Inc. For Modification of License of Station KOOG-TV, Ogden, Utah, et al.*, Memorandum Opinion and Order, 7 FCC Rcd 3117, ¶ 6 (FCC 1992) (quoting *Colorado Radio Corporation v. F.C.C.*, 118 F.2d 24, 26 (D.C. Cir. 1941)).

<sup>15</sup> *Auction 902 Procedures Public Notice*, ¶ 26.

<sup>16</sup> *Id.*

<sup>17</sup> *Petition*, 4.

<sup>18</sup> *Id.*



analysis behind the propagation models used to develop such results.<sup>19</sup> Commnet heeded the Bureaus' specific advice as to what information should be provided and the Bureaus acted accordingly.

Incredibly, one page after these assertions, SBI then explains that it did not actually perform drive tests on all of the census blocks that it is claiming are unserved, as some of these blocks could not be tested due to "remote desert" terrain.<sup>20</sup> SBI does assume, however, that "it is highly unlikely that these Part 2 census blocks could be covered because they are adjacent to the roads that are not covered."<sup>21</sup> Many of the census blocks in SBI's "Part 2" list – which, as SBI declares, **were not tested** – actually overlap with Commnet's **substantiated covered census blocks**. SBI is, for all intents and purposes, asking the Bureaus to change their mind by relying upon SBI's unsupported assumption that these areas are uncovered simply because SBI says so – and to disregard Commnet's analysis, which the Bureaus already found "credible and convincing."<sup>22</sup>

Moreover, SBI's engineer, Mr. Nevarez, specifically states that "SBI's engineering technicians, including myself, were provided an LG CU920 from AT&T and an USB760 modem from Verizon Wireless – both with active retail data plans."<sup>23</sup> Thus, SBI admits that they only drive tested for AT&T and Verizon Wireless – they did not conduct any drive tests for other carriers. Since there is not yet any roaming available in the 700 MHz arena, using the equipment referenced by Mr. Nevarez would only have alerted SBI to the presence of a 3G signal from AT&T and/or Verizon Wireless. Thus, even assuming for the sake of argument that SBI's

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<sup>19</sup> Commnet Reply Comments, 2-5, Appendix A: Declaration of Julie Hall (filed May 24, 2013).

<sup>20</sup> *Petition*, 5.

<sup>21</sup> *Id.*

<sup>22</sup> *Auction 902 Procedures Public Notice*, ¶ 26.

<sup>23</sup> *Petition*, Attachment A: Statement of Horacio Nevarez.



showing had some probative value with respect to the existing 3G coverage of AT&T or Verizon Wireless, SBI's showing has no probative value on the question of whether there is any existing 3G coverage in the area.

Furthermore, the majority of the census blocks listed on both Part 1 and Part 2 of SBI's list have a population of zero. In fact, of the 1,519 census blocks referenced by SBI in Exhibit B, Part 1, 1,244 – or approximately 82% – of such census blocks have a population of zero. In addition, a brief review of Exhibit B, Part 2 illuminates a similar conclusion – that most of the listed census blocks have a population of zero.<sup>24</sup> The purpose of Auction 902 is to maximize “the population covered in eligible areas on Tribal lands within the established budget”<sup>25</sup> and in order to do so, the Bureaus has decided to “exclude[] unserved census blocks that lack population.”<sup>26</sup> Thus, SBI should not be allowed to introduce census blocks (many of which are already covered) that have zero population. To do so would contradict the Bureaus' own prior determination, and contradict the fundamental purpose of the upcoming Tribal Mobility Fund Auction.

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<sup>24</sup> Exhibit B, Part 2 is 195 pages long, making a full analysis in the short time frame provided for comments on the *Petition* overly burdensome. However, a simple review of the first ten pages of this Exhibit, which appears to be representative based on a scan of the other pages, shows that of the 620 census blocks listed on those ten pages, 511 have a population of zero. See *Petition*, Exhibit B, Part 2.

<sup>25</sup> *Auction 902 Procedures Public Notice*, ¶ 10.

<sup>26</sup> *Id.* at ¶ 32.



### III. CONCLUSION

For the above reasons, the Parties respectfully request that the Bureaus dismiss or deny SBI's *Petition*.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I, Jessica DeSimone, hereby certify that on the 16th day of September, 2013, I caused a true and correct copy of the foregoing Joint Opposition to Petition for Reconsideration to be sent by first class mail and electronic mail to:

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